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S.A.



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ATTORNEYS AND COUNSELORS AT LAW

January 24, 2006

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too

VIA HAND DELIVERY

Charles L.A. Terreni, Chief Clerk
Public Service Commission of South Carolina
101 Executive Center Drive, Saluda Building
Columbia, SC 29210

RECEIVED

JAN 24 2006

FSC SC
DOCKETING DEPT.

Re: PSC Docket No. 2004-316-C
Petition of BellSouth Telecommunications, Inc To Establish Generic
Docket To Consider Amendments to Interconnection
Agreements resulting from Change of Law

Dear Mr. Terreni:

Enclosed for your consideration is an Order of the Georgia Public Service Commission issued Friday, January 20, 2006, in the Georgia generic "change-of-law" proceeding. The Georgia proceeding in which this decision was issued addressed the same issues list as is before the Commission in this proceeding.

In the Order, entitled "Order Initiating Hearings To Set A Just And Reasonable Rate Under Section 271," Georgia joined Tennessee and other states in asserting jurisdiction over Section 271 checklist unbundling rates, and launched an expedited evidentiary proceeding to establish such rates by March 11, 2006. In the Order, the Georgia Commission concluded that "it is reasonable to assert jurisdiction to set just and reasonable rates for de-listed UNEs pursuant to Section 271 of the Federal Telecom Act. Pursuant to this jurisdiction, the Commission will proceed with an expedited hearing schedule as detailed below for the purpose of setting just and reasonable rates for de-listed UNEs pursuant to Section 271." Order at 4.

After considering the language of Section 271, decisions of the FCC and the federal courts, the Georgia Commission held that the Act does not preempt states from arbitrating rates and terms for Section 271 checklist elements. The Georgia Commission also noted that the United States District Court in Maine had reviewed and rejected the same preemption argument raised by BellSouth, and that the Maine case is the first and, so far, only court decision in the country directly addressing a state commission's jurisdiction to arbitrate 271 UNE rates. The Georgia Commission found that BellSouth "had not cited to any federal court

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decision directly on point" in support of its arguments that state commissions are preempted from addressing Section 271 unbundling in Section 252 interconnection agreements. Id.

CompSouth has also enclosed for your information an ex parte letter from CompSouth to the FCC concerning the Section 271 jurisdictional issue. The letter, filed on January 23, 2006, responds to BellSouth's pending preemption petition and defends state commissions' statutory authority to establish rates, terms, and conditions for Section 271 unbundling in interconnection agreements approved by the states under Section 252. The CompSouth ex parte letter to the FCC also discusses in more detail the arguments outlined above.

Sincerely,

A handwritten signature in black ink, appearing to read "RmmtE2 2", with a long horizontal flourish extending to the right.

Robert E. Tyson, Jr.
Counsel for CompSouth

RET:alw
Enclosures
cc: All Counsel of Record

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Docket No. 19341-U

In Re: Generic Proceeding to Examine Issues Related to BellSouth
Telecommunications, Inc's. Obligations to Provide Unbundled Network
Elements

ORDER INITIATING HEARINGS TO SET A JUST AND REASONABLE RATE
UNDER SECTION 271

I. Background

The Georgia Public Service Commission ("Commission") initiated this docket on August 24, 2004. In its June 30, 2005 Procedural and Scheduling Order, the Commission directed the parties to submit a Joint Issues List. The Commission approved the Joint Issues List submitted by BellSouth Telecommunications, Inc. ("BellSouth") and Competitive Carriers of the South ("CompSouth")¹ along with the issues added by Digital Agent, LLC. (Order on Motion to Move Issues into Generic Proceeding, p. 2).

While the docket includes twenty-five (25) issues, the most significant issue, and one that impacts the resolution of several other issues in the docket, is set forth as part of Issue 8(a). Issue 8(a) states as follows:

Does the Commission have the *authority* to require BellSouth to include in its interconnection agreements entered into pursuant to Section 252, network elements under either state law, or pursuant to Section 271 or any other federal law other than Section 251?

¹ CompSouth is an association of Competitive Local Exchange Carriers.

At its January 17, 2006 Administrative Session, the Commission limited its consideration to only this issue. At a later time, the Commission will address the remaining issues.

II. Positions of the Parties

A. BellSouth

The foundation for BellSouth's position is that its obligations with respect to state commission approved interconnection agreements are tied exclusively to Section 251. It is from this premise that BellSouth argues that a state commission's authority does not extend to requiring an incumbent local exchange carrier ("ILEC") to comply with any terms and conditions based in any other section of federal law. BellSouth concludes that to the extent it has ongoing unbundling obligations under Section 271, then those obligations are to be enforced by the Federal Communications Commission ("FCC").

CompSouth's argument is based on a theory that Sections 251 and 271 are independent but interrelated. The first step in their analysis is pointing out that the Triennial Review Order established that the duties of an ILEC under Section 271 are independent from the obligations of a Bell operating company ("BOC") under Section 251. The import of this conclusion is that the omission of an obligation under Section 251 would not mean that the obligation ceases to exist under Section 271. The next step in the analysis focuses on the references to Section 252 interconnection agreements in Section 271. In short, CompSouth argues that because Section 252 interconnection agreements must include items from the Section 271 competitive checklist, state commissions have the authority to require ILECs to include in Section 252 interconnection agreements unbundling requirements under Section 271.

III. FINDINGS AND CONCLUSIONS

The Commission has examined the arguments of both parties and recognizes that the question of its jurisdiction on this issue has not been yet been squarely addressed by a controlling authority. The Commission will proceed with its analysis in an effort to act properly under the law and to protect the consumers of the State of Georgia. Incumbent local exchange carriers have the obligation to negotiate in good faith interconnection agreements with requesting telecommunications carriers. 47 U.S.C. § 251(c)(1). Under Section 252, these interconnection agreements may be voluntarily negotiated. 47 U.S.C. § 252(a)(1). State commissions may be asked to mediate disagreements that arise between the parties during negotiations. 47 U.S.C. § 252(a)(2). If the parties are unable to reach agreement through negotiation, then a party to the negotiation may petition the state commission for arbitration. In such an instance, the state commission resolves the issues set forth in the petition for arbitration and the response thereto. 47 U.S.C. § 252(b)(4)(C). Regardless of whether the interconnection agreement is reached through voluntary negotiation or compulsory arbitration, it must be approved by the state commission prior to becoming effective. 47 U.S.C. § 252(e)(1). A state commission is also authorized to reject an interconnection agreement. *Id.* Section 251(f) provides for the filing by a bell operating company of a Statement of Generally Available Terms ("SGAT"). In order to be approved by a state commission, such a filing must be found to comply with Section 251 and Section 252(d). 47 U.S.C. § 252(f)(2).

Section 271 compliance is necessary for a BOC to establish or maintain the right to provide interLATA long distance services. In order to comply with the requirements of Section 271, a BOC must provide access and interconnection pursuant to at least one Section 252 interconnection agreement or be offering access and interconnection pursuant to an SGAT. 47 U.S.C. § 271(c)(2)(A)(i). In addition, Section 271 requires that the BOC provide access to unbundled network elements (“UNEs”) on the competitive checklist set forth within the statute at just and reasonable rates. 47 U.S.C. § 271(c)(2)(B)(i). The Section 271 competitive checklist items (i) and (ii) make explicit reference to compliance with provisions in Sections 251 and 252. Therefore, the Section 252 agreements are the vehicles through which a BOC demonstrates compliance with Section 271. As such, it is logical to conclude that obligations under Section 271 must be included in a Section 252 interconnection agreement. This conclusion is consistent with the holding of the Minnesota District Court in *Qwest Corporation v. Minnesota Public Utilities Commission*, 2004 U.S. Dist. LEXIS 16963 (D. Minn. 2004). The District Court found that any agreement containing a checklist term must be filed as an ICA under the Act. *Qwest Corporation*. As stated above, state commissions have authority to approve or reject these interconnection agreements.

There are elements that a BOC must provide under Section 271 that the FCC has found no longer meet the Section 251 impairment standard. While a BOC is no longer obligated to offer such an element at TELRIC² prices, the element still must be priced at the just and reasonable standard set forth in Section 271. (*Triennial Review Order*, ¶ 663). In discussing the just and reasonable standard the FCC states as follows:

Thus, the pricing of checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are reviewed utilizing the basic just, reasonable and nondiscriminatory rate standard of sections 201 and 202 that is fundamental to common carrier regulation that has historically been applied *under most federal and state statutes*, including (for interstate services) the Communications Act.

Id. (emphasis added). Far from claiming the exclusive right to set the rates pursuant to this standard, the FCC expressly recognizes the application of such a standard at both the state and the federal level.

BellSouth’s preemption argument overstates what the Commission is being asked to do in this proceeding. By setting rates, the Commission is not enforcing Section 271. The FCC’s enforcement authority under Section 271 is clear. Section 271(d)(6) sets forth the actions that the FCC may take if it determines that a BOC has ceased to meet any of the conditions required for approval. The actions that the FCC may take if it finds such non-compliance include the issuance of an order obligating the BOC to correct the deficiency, the imposition of a penalty or the suspension or revocation of such approval. 47 U.S.C. 271(d)(6)(A)(i), (ii) and (iii). First, the Commission is not making a finding that BellSouth has failed to meet any of the conditions for Section 271 approval. Rather, it is setting just and reasonable rates for de-listed unbundled network elements. Second, the Commission is not taking any of the actions included in Section 271(d)(6). The setting of just and reasonable rates does not assume any of the responsibilities that the Federal Act reserves for the FCC under Section 271(d)(6).

² “TELRIC” is an acronym for total element long-run incremental cost.

Recently, the United States District Court for the District of Maine considered the question of whether the FCC has exclusive jurisdiction to establish, interpret, price, and enforce network access obligations under Section 271. The District Court concluded that the Federal Act did not intend to preempt state regulation of Section 271 obligations. *Verizon New England Inc. d/b/a Verizon Maine v. Maine Public Utilities Commission*, 2005 U.S. Dist. LEXIS 30288 at 16. The Court reasons that while it is the FCC that approves Section 271 applications, there is no provision in the federal act that grants the FCC exclusive ratemaking authority for Section 271 UNEs. *Id.* The Court further reasons that Section 271 only impliedly contemplates the making of rates, and it concludes that “the authority of state commissions over rate-making and its applicable standards is not pre-empted by the express or implied content of Section 271.” *Id.* at 17. Finally, the Court notes that Verizon did not cite to any FCC order that interpreted Section 271 to provide an exclusive grant of authority for rate-making under Section 271. *Id.*

The Commission finds similarly that BellSouth has not cited to any federal court decision directly on point. BellSouth cites to a decision of United States District Court for the Southern District of Mississippi³ for the proposition that the FCC enforces Section 271. (BellSouth Brief, p. 20). Similarly, BellSouth cites to a decision for the United States District Court for the Eastern District of Kentucky⁴ that also focuses on the issue of FCC enforcement authority for Section 271. *Id.* As discussed above, the question of enforcement of the statute is a separate issue from the question of setting just and reasonable rates.

Based on the foregoing, the Commission concludes that it is reasonable to assert jurisdiction to set just and reasonable rates for de-listed UNEs pursuant to Section 271 of the Federal Telecom Act. Pursuant to this jurisdiction, the Commission will proceed with an expedited hearing schedule as detailed below for the purpose of setting just and reasonable rates for de-listed UNEs pursuant to Section 271. The Commission will continue to monitor proceedings to determine whether any case law or FCC decision sheds additional light on the jurisdictional question under Section 271. In the absence of any additional guidance, the Commission will file an emergency petition with the FCC seeking that it clarify that state commissions have the authority to set just and reasonable rates for de-listed UNEs. Along with the petition, the Commission will certify the record from the evidentiary proceeding to be held in February in this docket. In the event that the FCC concludes that this Commission does not have jurisdiction to set Section 271 rates, then the expedited petition will ask the FCC to set rates for the de-listed UNEs based on the record that this Commission will have compiled and certified in the petition.

IV. HEARING DATES AND PROCEDURES

February 10, 2006

BellSouth and other interested parties may file cost studies and Direct Testimony regarding issues in this docket. Accompanied therewith shall be an electronic version of the

³ *BellSouth Telecommunications, Inc. v. Mississippi Public Serv. Com'n. et al.*, Civil Action No. 3:05 CV173LN, *Memorandum Opinion and Order* (S.D. Miss. Apr. 13, 2005), 2005 U.S. Dist. LEXIS 8498.

⁴ *BellSouth Telecommunications, Inc. v. Cinergy Communications Co., et al.*, Civil Action No. 3:05-CV-16-JMH, *Memorandum Opinion and Order*, (E.D. Ky. Apr. 22, 2005).

party's testimony, which shall be made on a 3.5" diskette using Microsoft Word® format for text documents and Excel® for spread sheets or other comparable electronic format. Under no circumstances should an electronic filing consist of more than four (4) files, including attachments. Cost studies may be filed on CD Rom. This filing shall be made at the office of the Executive Secretary, Georgia Public Service Commission, 244 Washington Street, S.W., Atlanta, Georgia 30334-5701. If a party chooses to use the BSTLM cost model to develop proposed rates, that party shall include in its testimony detailed descriptions of each and every change made within the model.

February 20-23, 2006

At 10:00 a.m., the Commission will commence hearings for Docket No. 19341-U beginning with the testimony of any public witnesses pursuant to O.C.G.A. § 46-2-59(g), and the hearing of any appropriate motions. After these preliminary matters, the Commission will conduct hearings on the testimony filed by BellSouth and the intervenors. Hearings will commence at 10:00 a.m. each day for the duration of the hearings, except that on February 21, hearings will commence at 1:30 p.m. The hearings will take place in the Commission Hearing Room on the First Floor of 244 Washington Street, S.W., Atlanta, Georgia 30334-5701.

February 28, 2006

All parties are to file an original and fifteen (15) copies of closing briefs, orders or recommendations. Accompanied therewith shall be an electronic version of a party's filing, which shall be made on a 3½ inch diskette using Microsoft Word® format for text documents and Excel® for spread sheets.

Discovery

The Commission finds and concludes that it is appropriate to permit the parties to conduct discovery in this proceeding, subject to the following procedures. The parties shall have the right to issue written discovery and conduct depositions. Written discovery, for parties other than the Staff, shall be limited to 25 requests. Objections to discovery shall be filed within ten (10) days after receipt of discovery. Responses to discovery shall be provided no later than fourteen (14) days after receipt of the request. Depositions shall be limited to one per witness. Parties should endeavor to keep their discovery requests focused on the issues in this docket, and to use written data requests in the first instance to obtain the data, information, or admissions they may seek. Discovery requests shall be served electronically, and all discovery requests must be served prior to January 24.

Copies of Pleadings, Filings and Correspondence

Parties shall file the original plus 15 copies, as well as an electronic version (Word format for text documents), of all documents with the Commission's Executive Secretary no later than 4:00 p.m. on the date due. However, only two copies need to be filed for discovery responses. In addition, copies of all pleadings, filing, correspondence, and any other documents related to, and submitted in the course of this docketed matter (except for discovery requests and responses) shall be served upon the other parties as well as upon the following individuals in their capacities as indicated below:

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Record

The parties shall be responsible for bringing before the Commission all evidence that they wish to have considered in this proceeding. The Commission may also require the parties to provide any additional information that the Commission considers useful and necessary in order to reach a decision. Any party filing documents or presenting evidence that is considered by the source of the information to be a "trade secret" under Georgia law, O.C.G.A. § 10-1-761(4), must comply with the rules of the Commission governing such information. *See* GPSC Rule 515-3-1-.11 Trade Secrets (containing rules for asserting trade secret status, filing both under seal and with public disclosure versions, use of protective agreements, petitioning for access, and procedures for challenging trade secret designations). Responses to discovery will not be considered part of the record unless formally introduced and admitted as exhibits.

Testimony of Witnesses

(a) Summations of direct testimony will take no longer than ten (15) minutes, unless the Commission, in its discretion, allows for a longer period of time.

(b) In the absence of a valid objection being made and sustained, the pre-filed testimony and exhibits, with corrections, will be admitted into the record as if given orally prior to the summation made by witnesses subject to a motion to strike after admission or other relevant objection.

(c) Where the testimony of a panel of witnesses is presented, cross-examination may be addressed either to the panel, in which case any member of the panel may respond, or to any individual panel member, in which case that panel member shall respond to the question.

Rights of the Parties

The parties have the following rights in connection with this hearing:

- (1) To respond to the matters asserted in this document and to present evidence on any relevant issue;
- (2) To be represented by counsel at its expense;
- (3) To subpoena witnesses and documentary evidence through the Commission by filing requests with the Executive Secretary of the Commission; and
- (4) Such other rights as are conferred by law and the rules and regulations of the Commission.

WHEREFORE, it is

ORDERED, that the Commission hereby adopts the procedures, schedule, and statements regarding the issues set forth within this Order.

ORDERED FURTHER, that the Commission hereby asserts its authority under Section 271 of the Federal Act to set just and reasonable rates for de-listed unbundled network elements.

ORDERED FURTHER, that at the conclusion of the proceedings the Commission will file with the FCC an expedited petition as described herein.

ORDERED FURTHER, that a motion for reconsideration, rehearing or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

ORDERED FURTHER, jurisdiction over this matter is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 17th day of January 2006.

REECE MCALISTER
EXECUTIVE SECRETARY

STAN WISE
CHAIRMAN

Date

Date



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January 23, 2006

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *BellSouth Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-245

Dear Ms. Dortch:

Competitive Carriers of the South, Inc. ("CompSouth"), an association of competitive local exchange carriers ("CLECs") operating in the BellSouth region, submits this letter in opposition to the Emergency Petition for Declaratory Ruling and Preemption of State Action ("Petition") filed by BellSouth Telecommunications, Inc. ("BellSouth") in the above-captioned docket. The purpose of this letter is to bring to the Commission's attention recent developments regarding the subject of BellSouth's petition, to respond to several *ex parte* submissions from BellSouth, and to encourage the Commission to reject BellSouth's Petition.

I. State Authority Over Section 271 Network Elements

In the Petition, BellSouth asks the FCC to preempt a decision of the Tennessee Regulatory Authority ("TRA") which arose in the context of an arbitration proceeding between BellSouth and ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") conducted pursuant to Section 252 of the Act.¹ The TRA determined that BellSouth was obligated under the Section 271(c)(2)(B) Competitive Checklist² to offer local switching at a "just and reasonable" rate and that the rates and terms of BellSouth's offer should be included in the parties' interconnection agreement.³ BellSouth contends that the TRA has no authority to arbitrate rates under Section

¹ 47 U.S.C. §252.

² 47 U.S.C. §271(c)(2)(B).

³ After the TRA ruled that the agency had jurisdiction to resolve the 271 rate issue, the Authority asked each party to submit a "final best offer" with a proposed rate for local switching offered under Section 271. After considering offers from both sides, the agency adopted ITC^DeltaCom's proposal to set an interim switching rate of \$5.08 per month, including usage, subject to a retroactive true-up following the establishment of a permanent rate. This interim rate is about 25% to 50% higher than the TRA TELRIC switching rate. The final best offer adopted by the Authority also requires BellSouth to "treat [Section 271 local switching] identically to the section 251 unbundled local switching element, except as to its monthly recurring price, with respect to the terms and conditions of service, connection with other elements,

271, arguing that both the Act and the *Triennial Review Order* grants the FCC exclusive authority to regulate Section 271 rates.⁴ Accordingly, BellSouth requests that the FCC issue an order declaring that states have no jurisdiction over network elements provided pursuant to section 271 and preempting the TRA's order. Contrary to BellSouth's request, as shown below, the TRA acted within its authority, and the processes it followed constitute the most efficient means by which to administer the Bell operating companies' ("BOCs") Section 271 network element obligations.

BellSouth's preemption request was filed on July 1, 2004, shortly after the TRA orally announced its decision in the BellSouth-ITC^DeltaCom arbitration proceeding. The agency's written order, dated October 20, 2005, has now been released. The order is available on the TRA website at www.state.tn.us/tra/orders/2003/0300119db.pdf.⁵ The order includes a lengthy analysis and discussion of the TRA's jurisdiction to resolve disputes over Section 271 network elements. The order concludes that Congress explicitly charged state commissions with the responsibility to arbitrate rates, terms and conditions of Section 271 elements when it determined that BOCs must satisfy their Competitive Checklist obligations through interconnection agreements and required that those interconnection agreements be approved by state commissions under Section 252.

The Authority explained,

[T]here is no language contained in the Federal Act that expressly prohibits state jurisdiction over Section 271 elements that are

interoperability with other elements, and pricing with other elements. No changes to ordering, provisioning, maintenance or repair may be introduced that distinguish between the section 251 element and the section 271 element."

⁴ BellSouth Petition at 3-4.

⁵ Final Order of Arbitration Award, Docket No. 03-00119, Tennessee Regulatory Authority at 24-39 (rel. Oct. 20, 2005) ("TRA Order"). On November 4, 2005, BellSouth filed a petition requesting reconsideration. On December 12, 2005, the TRA orally rejected BellSouth's petition and re-affirmed its decision on the Section 271 issue. A written order on the petition to reconsider is expected shortly. Any party aggrieved by the Authority's decision may, of course, file an appeal in the United States District Court, Middle District of Tennessee, pursuant to Section 252(e)(6) of the Act. Such an appeal is the *exclusive* means by which an aggrieved party may seek review of state commission arbitration rulings. See *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000); and *MCImetro Access Transmission Serv., Inc. v. BellSouth Telecomm., Inc.*, 352 F.3d 872, 875-76 (4th Cir. 2003).

After BellSouth filed its preemption petition with the FCC, ITC^DeltaCom filed a lawsuit against both BellSouth and the FCC, arguing that BellSouth cannot lawfully circumvent the appeals process provided in Section 252(e)(6) by filing an "appeal" of the TRA's decision with the FCC. ITC^DeltaCom asked the District Court, *inter alia*, to instruct the FCC to dismiss BellSouth's petition. The lower court held that only a United States Court of Appeals could grant the requested relief. The case is now pending before the United States Court of Appeals for the Sixth Circuit which presumably has the power, if it chooses, to grant the plaintiff's request. *ITC^DeltaCom v. BellSouth and Federal Communications Commission*, Case No. 05-5419.

included in issues required to be arbitrated pursuant to Section 252. Rather, there is language that indicates that Congress gave states a role in determining Section 271 elements through state approval of both SGAT conditions and interconnection agreements. . . . Section 271 of the Federal Act requires an incumbent telephone company to satisfy its competitive checklist obligations through interconnection agreements. These interconnection agreements are required to be approved by a state commission under Section 252.

TRA Order, at 31 (footnotes omitted).

The order goes on to reject BellSouth's argument that because Section 271 elements are subject to the requirements of Sections 201 and 202 of the Act, state commissions are precluded from arbitrating rates for those elements. BellSouth cites to paragraph 664 of the *Triennial Review Order* as support for this proposition. In rejecting BellSouth's interpretation of paragraph 664, the TRA states: "Paragraph 664 offers two examples of situations where the FCC will make determinations of fact regarding whether a rate for a Section 271 element is just and reasonable. There is nothing, however, in the above-quoted language, to *preclude* a state commission from setting the rate for a Section 271 element." *Id.* at 32 (emphasis supplied).

II. Federal District Court Decisions

The conclusion reached by the TRA that state commissions have authority through the Section 252 arbitration process to oversee the rates and terms for Section 271 network elements also was reached by the Maine Public Utilities Commission. Verizon appealed that ruling and, in a recent order denying a request for a stay of the state commission's order, the U.S. District Court for the District of Maine upheld the Maine Commission's exercise of authority.⁶

To CompSouth's knowledge, this is the first and, thus far, only court in the country to review a state commission's decision to arbitrate 271 UNE rates. The court considered and rejected the same legal arguments made in BellSouth's petition.

As the District Court wrote, "This case focuses on the issue of whether the PUC is precluded by the provisions of the [Federal Telecommunications] Act and the applicable rulings of the FCC from fixing rates under §271 of the Act." Opinion at 5. The plaintiff, Verizon, argued that "Congress gave the Federal Communications Commission . . . exclusive jurisdiction to establish, interpret, price, and enforce these network access obligations under Section 271." *Id.* That is the identical argument made by BellSouth in its preemption petition.

⁶ See *Verizon New England, Inc. d/b/a/ Verizon Maine v. Maine Public Utilities Commission*, Order Denying Plaintiff's Motion for Preliminary Injunction, ____ F. Supp. 2d ____, 2005 WL 3220211 (D. Me., Nov. 30, 2005).

The Maine District Court disagreed:

The central, vital predicate for this argument is that federal law preempts state regulation of § 271 obligations. It is clear that the statute is not intended to have any such effect. While § 271 states that the approval of an application submitted by a BOC to provide InterLATA services shall be by the FCC, *see* §§271(d)(1) and (b)(1), neither that provision nor any other provision in the Act confers exclusive jurisdiction on the FCC with respect to rate-making for §271 UNEs.

Id.

The court further noted that Verizon's (and BellSouth's) claims of exclusive FCC jurisdiction are not supported by any FCC decisions (*Id.*):

Furthermore, Verizon has failed to direct the Court to any order of the FCC interpreting §271 to provide an exclusive grant of authority for rate-making under §271. The FCC order presented by Verizon that relates to rate-making under §271 provides "[w]hether a particular checklist element's rate satisfies the just and reasonable pricing standard of section[s] 201 and 202 is a fact-specific inquiry that the [FCC] will undertake." TRO ¶664. That language [which BellSouth also cites] says nothing, however, about the exclusivity of FCC jurisdiction or about PUC rate-making authority. Here again, Plaintiff overreaches. Verizon has failed to present, and this Court has been unable to find, any FCC order specifically interpreting the Act as providing the FCC with exclusive authority to set rates under §271.

In contrast to the *Verizon Maine* decision discussed above, which directly addresses the scope of state authority under Section 271, BellSouth claims that an unrelated discussion in another U.S. District Court opinion, *Qwest v. Schneider*,⁷ "confirms BellSouth's legal position" that state commissions have no authority to set rates for services offered solely pursuant to Section 271.⁸ This assertion is quite remarkable because Section 271 is nowhere mentioned in the court's decision.

As described by the court, the Montana Public Service Commission ordered Qwest and Covad to submit for the state commission's approval a line-sharing contract between the carriers. All parties conceded that Qwest was not required to offer line-sharing under Section 251. Nevertheless, the Montana PCS held that the line-sharing contract was an "interconnection

⁷ *Qwest v. Schneider*, CV-04-053-H-CSO, (D. Montana, June 5, 2005).

⁸ Letter to Marlene H. Dortch, Secretary, FCC, from Bennett L. Ross, General Counsel - D.C., BellSouth, WC Docket No. 04-245 (July 22, 2005) at 2.

agreement” as that term is used in sections 252(a)(1) and (c)(1) of the Act and that those sections require that such agreements be submitted for state approval. The court overturned the agency’s decision, finding that the term “interconnection agreement” as used in sections 252(a)(1) and (c)(1) refers to an agreement which includes “interconnection, services or network elements provided pursuant to Section 251.”⁹ Since the Qwest-Covad contract “concerns only line-sharing”¹⁰ and did not include any 251 services or elements, the Court found that the carriers were not required to submit the contract to the state commission for approval.

It is hard to see how this decision can be construed as supporting BellSouth’s argument on the Section 271 issue. Since Qwest and Covad had voluntarily entered into a line-sharing contract, there was no discussion (or apparent need to discuss) whether line-sharing is a Section 271 obligation. Since the contract did not include any Section 251 services or elements, and because there was no issue as to whether the contract was entered into by the parties to fulfill Qwest’s obligations under Section 271, the court’s conclusion that the contract did not fall under the state’s jurisdiction is plainly irrelevant to BellSouth’s Section 271 argument.

III. Georgia Commission Decision

Most recently, the Georgia Public Service Commission has unanimously agreed that the agency has jurisdiction under the Act to determine 271 UNE rates and voted to conduct an expedited, evidentiary hearing to conclude in time for the state agency to determine just and reasonable Section 271 rates before March 11, 2006.¹¹

This decision and pending proceeding in Georgia provide additional evidence that state regulatory commissions are fully able and prepared to apply the federal “just and reasonable” standard in arbitrating 271 UNE rates, thereby assuring that competitors will continue to have meaningful access to local facilities as envisioned by Congress and provided in the Competitive Checklist.

Congress granted concurrent jurisdiction to the FCC and the states to administer the ongoing obligations of the Section 271 Competitive Checklist and the most logical and efficient way to exercise that shared jurisdiction is for each regulatory body to do what it does best: the states arbitrate 271 rates and terms subject to standards established by the FCC while the FCC sets those national guidelines and reviews individual complaints pursuant to Section 271(d)(6).¹²

⁹ Slip op. at 14, quoting Section 252(a)(1).

¹⁰ *Id.* at 16, n. 47.

¹¹ The order released January 20, 2006, may be found at <http://www.psc.state.ga.us/19341/89229.doc>.

¹² As noted above, BellSouth contends that the FCC has exclusive jurisdiction to ensure compliance with the section 271 Competitive Checklist and that rates and terms for section 271 elements do not belong in interconnection agreements administered by state commissions. BellSouth maintains that the availability of commercial agreements for the purchase of Competitive Checklist elements evidence its compliance with its section 271 obligations. Importantly, however, on October 5, 2005, BellSouth posted Carrier Notification SN91085205, which informed CLECs that its long-term commercial offering for section 271 local switching would expire on

Ms. Marlene Dortch
January 23, 2006
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State commissions are best suited to undertake the detailed, fact-specific inquiries necessary to apply the just and reasonable and nondiscrimination standards to specific Section 271 element rates and terms. If the states are barred from exercising any oversight of Section 271 element rates and terms, carriers will be forced in every instance to file FCC complaints to obtain review of BOC Section 271 element offerings. The FCC would likely be inundated with state-specific complaints which the agency would find it nearly impossible to resolve within the 90-day statutory deadline.

IV. Conclusion

BellSouth's preemption argument has no legal basis. Section 271 requires BellSouth to offer access to switching, loops, and transport "pursuant to one or more [Section 252 interconnection] agreements" which must be approved by state commissions.¹³ The Act is clear; state arbitrators have express jurisdiction over disputes about 271 elements. The company cannot erase statutory requirements by ignoring them. Instead of addressing the language of Section 271, BellSouth relies on policy arguments which implicitly denigrate the competence of state arbitrators to determine "just and reasonable" rates and would likely result in an unmanageable flood of complaints to the FCC.

The recent decisions in Tennessee and Georgia and the Maine District Court decision rejecting the Bell carriers' preemption argument have further undermined BellSouth's preemption request. For these reasons, the Commission should deny BellSouth's Petition and instead confirm that the FCC and the state commissions have concurrent authority to oversee the BOCs' obligations to provide Section 271(c)(2)(B) network elements at rates, terms and conditions that are just, reasonable, and nondiscriminatory.

Very truly yours,
BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: 
Henry Walker

HW/djc
Enclosures

cc: Chairman Kevin Martin
Commissioner Michael Copps
Commissioner Jonathan Adelstein
Commissioner Deborah Tate
Dan Gonzalez

October 10, 2005. Consequently, today BellSouth does not have a long-term section 271 local switching offering that is available to CLECs.

¹³ 47 U.S.C. §271(c)(2)(A).

Ms. Marlene Dortch
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CERTIFICATE OF SERVICE

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